The Hecla Press, 101 Varick Street, N. Y. C. Tel. WAlker 5-1891

FILE COPY

FEB 2 19
CHARLES ELMORE C

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 535.

TRANSIT COMMISSION AND WILLIAM G. FULLEN, LEON G. GODLEY AND REUBEN L. HASKELL, CONSTITUTING THE TRANSIT COMMISSION, *Appellants*,

against

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY AND THE INTERSTATE COMMERCE COMMISSION, *Appellees*.

STATE OF NEW YORK, *Appellant*,

against

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY AND THE INTERSTATE COMMERCE COMMISSION, *Appellees*.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE LONG ISLAND RAILROAD COMPANY.

ALFRED A. GARDNER,
D. P. WILLIAMS,
JOSEPH F. KEANY,
Counsel for Appellees.

The Evening Post Job Printing Office, Inc., 154 Fulton St., New York, N. Y.

INDEX.

	PAGE
Opinions below	2
Statement	2
The Question before this Court	3
The Statute under which the Interstate Commerce Commission acted	4
The New York State Statute	9
Proceedings before the Interstate Commerce Commission	9
Certificate and Order in full	10
Description of the joint facility and the successive trackage agreements approved by the State Commissions	13
Summary of Argument	18
Argument:	
I. The jurisdiction of the Interstate Commerce Commission over extensions and abandonments, Section 1(18), and the use of terminals, Section 3(4), is exclusive	22
II. The operation by one railroad company beyond its chartered route over the line of another railroad company by a joint facility trackage agreement is an extension within the requirements of Section 1(18).	30
III. The provisions of Section 1(18) apply to the continuance of an operation begun prior to 1920	39
Conclusion	40

TABLE OF CASES CITED.

	PAGE
Abandonment by C. R. I. & P. Ry., 131 I. C. C. 421.	33
Alabama Ry. Co. *v.* Jackson Ry., 271 U. S. 244....	22
Atchison Ry. *v.* Railroad Comm., 283 U. S. 380..20, 34, 36	
Boston & Maine Rd. *v.* Hooker, 233 U. S. 97.....	19, 33
Central New England R. Co. *v.* B. & A. R. Co., 279 U. S. 415.....	39
Chicago & Alton R. R. Co. *v.* T. P. & W. Ry. Co., 146 I. C. C. 171.....	33
Colorado *v.* U .S. *et al.*, 271 U. S. 153....18, 22, 23, 24, 29	
Construction of Union Passgr. Sta. & Equipment Term., by Cincinnati Union Terminal Co., 138 I. C. C. 297.....	33
Control of L. & J. Bridge & R. R. Co., 145 I. C. C. 131	33
Dayton-Goose Creek Ry. Co. *v.* The United States, *et al.*, 263 U. S. 456.....18, 22, 23	
El Dorado & W. Ry. Co. *v.* Chi. R. I. & P. Ry. Co., 5 F(2) 777.....	22
Erie Barge Canal Cases—U. S. *v.* N. Y. C. R. R., 272 U. S. 457; People *ex rel.* N. Y. C. *v.* P. S. C., 198 A. D. 436, affirmed without opinion, 232 N. Y. 606.....	22
F. W. & D. C. Ry.—C. R. I. & G. Trackage Rights, 99 I. C. C. 73.....	32, 33
I. C. C. *v.* Los Angeles, 280 U. S. 52.....	20, 34
Logan *v.* Davis, 233 U. S. 613.....	19, 33
Los Angeles Terminal Cases, 264 U. S. 331; 280 U. S. 52; 283 U. S. 380.....20, 22, 30, 33, 34	
M. K. T. R. Co. *v.* Northern Oklahoma Rys., 25 F(2) 689	22
Missouri-Kansas-Texas Reorganization, 76 I. C. C. 84	32

PAGE

N. Y. Central Securities Corp. *v.* U. S., 54 F(2) 122 ..... 20, 34
Operation by G. M. & N. R. R., 124 I. C. C. 641.. 33
Operation of Line by G. M. & N. R. R. Co., 111 I. C. C. 583..... 32
Operation of Line by Kansas City So. Ry., 99 I. C. C. 777 33
Operation of Line by Superior & Southeastern Ry., 86 I. C. C. 403..... 32
Operation under Trackage Rights by B. & O., 138 I. C. C. 171..... 33
People *v.* P. S. C., 233 N. Y. 113..... 22
People *ex rel.* N. Y. C. *v.* P. S. C., 198 A. D. 436 (affd. without opinion, 232 N. Y. 606)..... 22
R. R. Comm. *v.* Southern Pacific Co., 264 U. S. 331; 280 U. S. 52; 283 U. S. 380 (Los Angeles Terminal Cases) 20, 22, 30, 33, 34
Southern Ry. Co. *v.* Shealy *et al.*, 18 F(2) 784.... 22
Texas & Pacific Ry. *v.* Abilene Cotton Oil Co., 204 U. S. 426..... 19, 33
Texas & Pacific Ry. *v.* Gulf Ry., 270 U. S. 266.... 22
Transit Commission *et al. v.* United States, *et al.*, 284 U. S. 360.....18, 22, 29
U. S. *v.* N. Y. C. R. R., 272 U. S. 457..... 22
Western Pacific R. Co. v. Nevada-California-Oregon R., 40 F(2) 731..... 39

INDEX OF STATUTES CITED.

	PAGE
28 U. S. C. 41 (28) 43, 48	2
28 U. S. C. 47a	3
Interstate Commerce Act (U. S. Code, Title 49) Sec. 1, Paragraphs 18 to 20, and 22.	
Sec. 1 (18)	4
Sec. 1 (19)	5
Sec. 1 (20)	5
Sec. 1 (22)	6
Interstate Commerce Act (U. S. Code, Title 49) Sec. 3 (4)	6
New York State Railroad Law, Section 148	9

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1932.

No. 535

TRANSIT COMMISSION and WILLIAM G. FULLEN, LEON G. GODLEY and REUBEN L. HASKELL, constituting the Transit Commission,
Appellants,

AGAINST

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

STATE OF NEW YORK,
Appellant,

AGAINST

THE UNITED STATES OF AMERICA, THE LONG ISLAND RAILROAD COMPANY, THE PENNSYLVANIA RAILROAD COMPANY and THE INTERSTATE COMMERCE COMMISSION,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLEES THE PENNSYLVANIA RAILROAD COMPANY AND THE LONG ISLAND RAILROAD COMPANY.

Opinions Below.

The opinion of the specially constituted District Court is reported *Transit Commission* v. *U. S., et al.,* 1 F. Supp. 595, and will be found also at R. 564.

The Interstate Commerce Commission, Division 4, rendered two opinions, a first Report, March 18, 1930, *Long Island Railroad Company Trackage,* 162 I. C. C. 218, (R. 334) and a supplemental Report, February 8, 1932, *Long Island Railroad Trackage,* 180 I. C. C. 439 (R. 537).

Statement.

This suit was brought under 28 U. S. C. 41 (28), 43-48, to enjoin, set aside, suspend and annul a certificate and order of the Interstate Commerce Commission in a proceeding designated as Finance Docket No. 7308, entered February 8, 1932, whereby that Commission certified under Section 1(18) of the Interstate Commerce Act that the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company, from Sunnyside Yard in the Borough of Queens to and under the East River and the Borough of Manhattan to and in the Pennsylvania Station at 7th Avenue, under trackage rights over the railroad of the Pennsylvania Tunnel and Terminal Railroad Company (Pennsylvania Railroad Company, Lessee) and prescribed the terms of the trackage right agreement for such operation.

Identical petitions filed by the State of New York and by the Transit Commission (constituting the Metropolitan Division of the Department of Public Service of that State)

were consolidated by the District Court (R. 70, 564). The Interstate Commerce Commmission intervened in opposition to both petitions (R. 10, 54).

On June 8th, 1932, upon the application of the Transit Commission and the State an order to show cause was made convening a special court of three judges—the Honorable Augustus N. Hand, United States Circuit Judge, and the Honorable Robert P. Patterson and William Bondy, United States District Judges—and requiring the respondents to show cause before that Court on June 28th, 1932, why the Order of the Interstate Commerce Commission should not be temporarily enjoined (R. 65, 66).

At the hearing held on the order to show cause on June 29th, 1932, all parties rested on the record before the Interstate Commerce Commission and submitted the case for final determination (R. 564, 565).

On October 3rd, 1932, the Court handed down a unanimous opinion holding that the petition should be dismissed on the merits. A final decree to that effect was made and entered October 19th, 1932 (R. 580).

From the decree so entered this appeal was taken pursuant to Sec. 47a, Title 28 of the United States Code (R. 584).

The Question Before This Court.

The sole question before this Court is whether the certificate and order made by the Interstate Commerce Commission are within the Commission's constitutional and statutory authority.

There is no controversy over the facts. As the Court below pointed out in its opinion (R. 568): "It is conceded that public convenience and necessity require the continuance of the use by the Long Island of the Pennsylvania facilities and there is no claim that the findings of fact of the Interstate Commerce Commission were unsupported by the evidence."

The Statute Under Which the Interstate Commerce Commission Acted.

Section 1, paragraphs 18 to 20 and 22 were added to the Interstate Commerce Act by the Transportation Act of 1920. They were in full as follows:

> (18) [After ninety days after this paragraph takes effect] no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation, thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.
>
> [The words in brackets *supra* omitted in subsequent codification U. S. C. Title 49.]

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any

court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construction or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation.

The railroad companies in making their application to the Interstate Commerce Commission invoked not only Section 1(18) but Section 3(4) which deals with terminals and in full is as follows:

§3(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power to require the use of any such terminal facilities, including main line track or tracks for a reasonable distance outside of such terminal, of any carrier by another carrier or other carriers, on such terms and for such compensation as the

carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

The Interstate Commerce Commission took the view that it had ample authority under Section 1(18) that there was no necessity for applying Section 3(4) even if that Section were applicable.

In retaining jurisdiction under Section 1(18) the Commission said (162 I. C. C. at p. 220):

> "The granting of authority for the applicants' proposal under section 1(18) is both necessary and appropriate, and there is no sound reason preventing the assumption of jurisdiction by us under this part of the act, even though joint operation began prior to the effective date of the transportation act, 1920, and has been continuous. As to Section 3(4), which pro-

vides for the compulsory opening of one carrier's terminal facilities to another carrier when the public interest requires such use, there is nothing in the situation here presented which brings it within the terms of that paragraph. By voluntary arrangements between the parties the Long Island has been using the tunnel, yard, and terminal facilities provided for it by the Pennsylvania in New York since September 8, 1910. There is no suggestion that the Pennsylvania intends to discontinue this privilege. The question of compensation is indeed at issue, but contrary to the applicants' understanding of the force of this fact, associated as it is with the close corporate relationship between the companies, the applicability of section 3(4) does not appear. Accordingly, the fixing of compensation as therein provided on the principle controlling compensation in condemnation proceedings, may be disregarded. That part of the application which is under section 3(4) will therefore be dismissed. The reasonableness of a joint facility rental is in general a matter of public interest, as well as a matter which may affect the operations of the carriers in interstate commerce, and should be considered by us in reaching a finding of public convenience and necessity. Thus, the financial as well as the transportation features of the present application may be fully recognized and dealt with under the authority conferred by section 1(18). In cases of extensions of operations under trackage rights the cost of the applicant companies is not less important than in cases of extension by construction, acquisition, or lease. A motion to dismiss the application on the ground of lack of jurisdiction was properly denied."

The New York State Statute.

Section 148 of the Railroad Law of the State of New York contains the following provisions:

> "Subject to the permission and approval of the public service commission, any railroad corporation or any corporation owning or operating any railroad or railroad route within this state may contract with any other such corporation for the use of their respective roads or routes, or any part thereof, and thereafter use the same in such manner and for such time as may be prescribed in such contract. * * *"

Proceedings Before the Interstate Commerce Commission.

The application for the certificate of convenience and necessity was filed by the railroad companies December 13th, 1928 (R. 335, 72, 79). Part of the application was a proposed joint facility trackage agreement.

The Commission sent the application to an Examiner who held hearings and proposed a report (R. 334) in which he recommended:

> "(1) That the commission find that the present and future public convenience and necessity require the operation by the Long Island under trackage rights over the railroad of the Terminal Company as described in the application, but that the terms of the proposed agreement dated November 13, 1928, attached to the application, are inequitable, (2) that the issue of a certificate of public convenience and necessity be deferred until an agreement shall have been submitted to the commission, the terms of which are found to be fair and reasonable, and (3) that the part of the application which is for an order under section 3(4) be dismissed."

Exceptions having been filed to the Examiner's report by all the parties the Commission, Division 4, denied the railroad companies' application under Section 1(18) without prejudice to the submission of a modified contract and dismissed the application for an order under Section 3(4) (R. 356).

The railroad companies, having on December 27th, 1930, presented a revised contract (R. 357), the Commission again referred the application to the Examiner who again found the terms of the proposed contract unsatisfactory (R. 528). Exceptions were filed to his proposed report by all the parties. The Commission, Division 4, having heard arguments on the exceptions made a report (R. 538), and issued a certificate and order certifying that the public convenience and necessity required the continued operation under trackage rights as proposed, provided specific changes should be made in the terms and conditions of the contract which the carriers had last presented.

The certificate and order in full are as follows (180 I. C. C. at p. 447; R. 547):

CERTIFICATE AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 4, held at its office in Washington, D. C., on the 8th day of February, A. D. 1932.

Finance Docket No. 7308

LONG ISLAND R. CO. TRACKAGE

Hearings and investigation of the matters and things involved in this proceeding having been had,

and said division having, on March 18, 1930, and on the above date, made and filed reports containing its findings of fact and conclusions thereon, which reports are hereby referred to and made a part hereof:

It is hereby certified, That the present and future public convenience and necessity require the continued operation by The Long Island Railroad Company, under trackage rights, over the railroad of the Pennsylvania Tunnel & Terminal Railroad Company between Harold Avenue in Sunnyside yard, and the Pennsylvania station, New York, N. Y., including the joint use of said yard, station, and appurtenant facilities described in the record, under the terms and conditions of the proposed joint operating agreement dated December 23, 1930; *Provided, however,* and this certificate is issued upon the express condition, that said terms and conditions be modified in the respects and to the extent indicated in the accompanying report, to wit: In ascertaining currently the rental payable, additions and betterments to the Pennsylvania station building and service plant made subsequent to July 1, 1928, shall be excluded; the term of the aforesaid agreement shall be five years, with provisions for its extension from year to year unless terminated by at least six months' notice by either party to the other; Article VI of the proposed contract shall be omitted; the rate of interest to be applied on the investment cost of all jointly used property and facilities, according to the provisions of said agreement which are not otherwise affected by the changes herein prescribed, shall be 5 per cent per annum; and, the joint accounts of the parties shall be credited currently with all revenues from rents, privileges, and concessions within zones 2 and 3.

IT IS ORDERED, That, if within 60 days from the date hereof, The Long Island Railroad Company and The Pennsylvania Railroad Company shall jointly file with this commission written notice of the acceptance by them of the foregoing conditions, this certificate shall take effect and be in force from and after 30 days from the filing of said acceptance, and in such event the said carriers, within 30 days from the date of such acceptance, shall file with this commission duly verified copies of the joint operating agreement as modified in accordance with said conditions and executed.

By the commission, division 4.

GEORGE B. MCGINTY,
Secretary.

The Report of March 18th, 1930, referred to in and made part of the Certificate will be found at 162 I. C. C. 218 and the Report of February 8, 1932, also referred to in and made part of the Certificate will be found at 180 I. C. C. 446.

The railroad companies accepted the conditions, modified the joint operating agreement and executed and duly filed copies thereof in accordance with the Certificate and Order. The agreement as thus modified, accepted and filed will be found at R. 551.

The Transit Commission moved for a reargument or rehearing. The Interstate Commerce Commission denied the motion (R. 563).

Description of the Joint Facility and the Successive Trackage Agreements Prior to the One Which was Approved by the Certificate and Order here in Controversy.

The Pennsylvania Railroad Company and the Long Island Railroad Company are common carriers each engaged in interstate Commerce.

Part of the Pennsylvania Railroad Company's plan for extending its passenger service into the Borough of Manhattan, City of New York, by tunnels under the Hudson River from New Jersey, was also to extend the passenger service of the Long Island Railroad Company into Manhattan by tunnels from Long Island under the East River and to build a joint terminal station in the Borough of Manhattan for the passengers of both (R. 108, 154). The plan was consummated. The Pennsylvania Station was built. It was opened Sept. 8, 1910 (R. 107).

The Long Island Railroad Company has been operating into the Pennsylvania Station, New York City, since 1910 when the terminal was opened (Finding No. 1, R. 573). Its service was extended from Long Island under the East River and into the station in September of that year and was continued under successive trackage agreements approved by the Transit Commission of the State of New York (R. 95, 566, *et seq.*). The term of the last of the trackage agreements expired in 1927 (Finding No. 20, R. 577).

The corporate medium by which the terminal was established was the Pennsylvania Tunnel & Terminal Railroad Company, successor to The Pennsylvania, New York and

Long Island Railroad Company and The Pennsylvania, New York and New Jersey Railroad Company (R. 199). Its properties extend from Kearney, in Hudson County, in the State of New Jersey to Sunnyside, in the Borough of Queens, City and State of New York, and include a continuous railroad route across the meadows in New Jersey, under the Hudson River, under Manhattan Island and through the Pennsylvania Station, and under the East River with terminal yards in Manhattan and in the Borough of Queens, the yard in Queens being known as Sunnyside Yard (R. 73).

The portion of the terminal properties used as a joint facility by the Long Island comprises the Pennsylvania Station, the yards below the surface under and adjacent to the station site, the tunnels eastwardly under Manhattan Island and the East River to the Borough of Queens and the Sunnyside Yard (R. 551, *et seq.*).

The Pennsylvania Tunnel & Terminal Railroad Company's stock is all owned by the Pennsylvania Railroad Company. Its properties are all leased to and operated by the Pennsylvania Railroad Company, under lease dated June 14, 1928, and approved by the Interstate Commerce Commission, 145 I. C. C. 283 (Finding No. 2, R. 573).

The Pennsylvania Railroad Company owns all but a few shares of the stock of the Long Island Railroad Company (Finding No. 2, R. 573). But there is no lease; the Long Island operates its own railroad.

Upon the completion of the Pennsylvania Station and Terminal in 1910, the Long Island began to operate over the tracks of the Pennsylvania into the latter's station under a trackage agreement, for which the carriers sought

and obtained the necessary permission and approval of the Public Service Commission of the First District of the State of New York. This agreement was modified by another dated June 24, 1912, and the rental payable by the Long Island was, in 1920, and again in 1922, increased with the approval of the Public Service Commission and (after 1921), of its successor, the Transit Commission (Finding No. 3, R. 573, 574).

In 1923 the carriers made application to the Transit Commission for the approval of an amendment to the then existing trackage agreement, which involved a further increase of the rental payable by the Long Island. Under the terms of the existing agreement, the Long Island was paying to the Pennsylvania, as rental, a share of the operating expenses and taxes (less net revenue from station privileges) on the jointly used facilities east of Tenth Avenue, Manhattan, including the station building, and, in addition, a fixed sum of $300,000 per annum. The amendment proposed in 1923 required that the Long Island share on a wheelage basis in the interest at 4 per cent. on the investment in the jointly used facilities and in the station building, instead of paying the lump sum of $300,000 as before. This amendment was disapproved by the Transit Commission. (Findings Nos. 4 and 5, R. 574.)

In March, 1925, another application to the Transit Commission was made for approval of a trackage agreement similar to the one rejected, except that this application eliminated from the investment base the sum of $15,000,000 representing the cost of the station building above the track level, and increased the share in the interest from 4 to 5 per cent. This proposed agreement was disapproved by

the Transit Commission in May, 1925, but on July 28, 1925, approved upon a reduction of the interest rate by the carriers to 4 per cent. In November, 1925, a further application was made to the Transit Commission to approve an increase of the rate to 6 per cent. This was disallowed in December, 1925, but an extension of the agreement as approved July 28, 1925, was granted for one year from January 1, 1926. (Finding No. 11, R. 575, 576.)

The last extension by the Transit Commission of the agreement approved July 28, 1925 having expired, the railroad companies filed their application with the Interstate Commerce Commission on December 13th, 1928, as hereinabove set forth, thus instituting the proceedings which led to the certificate and order here in controversy.

The terms first proposed to the Interstate Commerce Commission were that the Long Island should pay on a wheelage basis not only its proportionate share of operating and maintenance charges but also its share of a return on the cost of the joint facility including the station building at 6% (R. 79, 105, 106).

After the disapproval of that proposal without prejudice the companies presented another agreement (R. 357, *et seq.*) which eliminated from the investment base $15,000,000 representing the Station Building above the track level, required the Long Island to pay 20 per cent of the operating expenses of that building and reduced the rate of interest to be computed on investment from 6 to 5¾ per cent. On February 8, 1932, the Interstate Commerce Commission granted the certificate of public convenience and necessity, upon condition that the terms of the agreement so proposed be modified. The condition was accepted and the agree-

ment modified, executed and filed all as hereinabove set forth (p. 12).

The Appellants in their brief (pp. 75-77) call attention to the increases in rental payments under the successive trackage agreements and to facts which seem to convey that the implications that the terms of the agreement impose an unreasonable burden on the Long Island.

The question of the reasonableness of the terms of the new agreement is not before the Court here. Since the amount of the rental payments has been referred to however it is not out of place, we believe, to call attention to the great and increasing use of the joint facility by the Long Island Railroad Company and the tremendous value of it as furnishing a passenger terminal to that Company in the Borough of Manhattan.

As a result of obtaining a direct all-rail route under the East River and a terminal in Manhattan the Long Island Railroad was no longer dependent on ferries (R. 93). Its business grew rapidly. In 1927 it reached a dividend-paying basis after having paid no dividend since 1896.

The growth of the Company's business and its increasing use of the terminal are shown by Exhibits 15, 16, 7 and 8 (R. 142, 142a, 140, 141). The passenger business grew from 27,500,000 passengers in 1909, the last full year before the opening of the Pennsylvania Station, to 112,500,000 in 1928. The freight business increased from 3,600,000 tons in 1909 to 9,000,000 tons in 1928. The investment in road and equipment in 1909 was $58,700,000 and in 1928 $131,700,000. The gross revenues in 1909 were $10,200,000 and in 1928 $30,500,000. There was no net income and in fact there was a slight deficit of $22,000

in 1909, while in 1928 the net income was $4,700,000. The corporate deficit of $3,400,000 in 1909, which increased by 1915 to over $7,000,000 was changed by 1928 to a corporate surplus of $9,700,000. In 1911, the first full year of operation into the Pennsylvania Station, the Long Island carried 6,200,000 passengers in and out of the station; the number of cars and locomotives was (each locomotive counted as three cars) 228,000. In 1928 the number of Long Island passengers in and out of the station had increased to 48,500,000 and the number of cars and locomotives to 1,370,000.

Summary of Argument.

I. The jurisdiction of the Interstate Commerce Commission over extensions and abandonments, Section 1(18), and the use of terminals, Section 3(4), is exclusive. This has been established and reiterated in a great number of cases, notably in *Dayton-Goose Creek Ry. Co.* v. *The United States, et al.*, 263 U. S. 456; *Colorado* v. *U. S.*, 271 U. S. 153; *Transit Commission et al.* v. *United States, et al.*, 284 U. S. 360.

II. The operation by one railroad company beyond its chartered route over the line of another railroad company by a joint facility trackage agreement is an extension within the requirements of Section 1(18).

The language of Section 1(18) clearly applies not only to construction of new trackage by a carrier in extension of its routes but to operation beyond its chartered routes by trackage agreement over the tracks of another carrier. Plainly the intent was to prevent a carrier from

operating beyond its chartered routes either over a branch or extension it might construct and own or over any line of railroad by whomsoever constructed or by whomsoever owned.

The purpose and purview of the broadened jurisdiction conferred by the Transportation Act amendments of 1920 upon the Interstate Commerce Commission demand such construction of the statute. If the restriction were construed as applicable only to extensions of operation by construction or acquisition of new line to be used only by the carrier and as not applicable to extensions by operation over tracks of another carrier by joint facility user, the purpose of the enlarged jurisdiction of the Interstate Commerce Commission would be defeated. Carriers by joint facility agreements could extend operation beyond their own chartered routes *ad libitum* entirely free from the supervision and restraint of the Interstate Commerce Commission. The reasons why the extension of operation should be limited and scrutinized and certified as necessary apply quite as much to operation by joint facility use if tracks of another carrier as to operation by new tracks built and owned.

The Interstate Commerce Commission in a multitude of cases, including the case here under review, has construed Section 1(18) as applicable to extension of operation by trackage agreement.

The continued assumption of jurisdiction and the practical construction placed upon the statute by the administrative body empowered to enforce it while not conclusive is entitled to great weight, see *Boston & Maine Rd.* v. *Hooker*, 233 U. S. 97, 118; *Texas & Pacific Ry. Co. Abilene Cotton Oil Co.*, 204 U. S. 426; *Logan* v. *Davis*, 233 U. S. at

627; *N. Y. Central Securities Corp.* v. *U. S.*, 54 F. (2) at 126.

This Court construed Section 1(18) as applicable to extensions by way of trackage rights in the Los Angeles Terminal Cases—*R. R. Comm.* v. *Southern Pacific Co.*, 264 U. S. 331; *I. C. C.* v. *Los Angeles*, 280 U. S. 52; *Atchison Ry.* v. *R. R. Comm.*, 283 U. S. 380.

III. The provisions of Section 1(18) apply to the continuance of an operation begun prior to 1920.

The fact that the Transit Commission had jurisdiction prior to 1920 over the joint facility trackage use and had exercised such jurisdiction did not suspend the operation of Section 1(18) and continue the jurisdiction of the Transit Commission.

The approval of the successive agreements by the Transit Commission and its predecessor, the Public Service Commission, was required because under the New York State statute a carrier could use the tracks of another carrier only with the approval of the State Commission (Sec. 148, Railroad Law) and as a condition of granting such approval the State Commission could specify the rental terms and conditions.

It is obvious that after the Transportation Act of 1920 had added Section 1(18) to the Interstate Commerce Act the State Commission could not compel abandonment of operation or specify the terms upon which it would permit operation to continue. The Transit Commission's power to authorize one interstate carrier to use the tracks of another jointly with the owning company was completely gone. And with it went the power to prescribe trackage

rental terms. Such power would exist as a necessary and inseparable part of the general and unlimited power granted the Interstate Commerce Commission even if not specified in terms by the granting statute. But the granting statute was specific. By Section 1(20) of the Interstate Commerce Act the Commission is given power when issuing a certificate of convenience and necessity to "attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require."

ARGUMENT.

I.

The jurisdiction of the Interstate Commerce Commission over extensions and abandonments, Section 1(18), and the use of terminals, Section 3(4), is exclusive.

Dayton-Goose Creek Ry. Co. v. *The United States, et al.*, 263 U. S. 456

Colorado v. *U. S.*, 271 U. S. 153

Transit Commission et al. v. *United States, et al.*, 284 U. S. 360

R. R. Comm. v. *Southern Pacific Co.*, 264 U. S. 331; 280 U. S. 52; 283 U. S. 380, (Los Angeles Terminal Cases)

Alabama Ry. Co. v. *Jackson Ry.*, 271 U. S. 244, 249, 250

Texas & Pacific Ry. v. *Gulf Ry.* 270 U. S. 266

Southern Ry. Co. v. *Shealy, et al.*, 18 F (2) 784

M. K. T. R. Co. v. *Northern Oklahoma Rys.*, 25 F(2) 689

El Dorado & W. Ry. Co. v. *Chicago, R. I. & P. Ry. Co.*, 5 F (2) 777

People v. *P. S. C.*, 233 N. Y. 113

Erie Barge Canal Cases, U. S. v. *N. Y. C. R. R.*, 272 U. S. 457, 464; *People ex rel. N. Y. C.* v. *P. S. C.*, 198 A. D. 436, affirmed without opinion 232 N. Y. 606.

Mr. Chief Justice Taft, writing in 1924 about the general scope and purpose of the Transportation Act of 1920 said for a unanimous court in a passage frequently quoted, *Dayton-Goose Creek Ry. Co.* v. *United States et al.*, 263 U. S. 456 at p. 478:

> "The new Act seeks affirmatively to build up a system of railways prepared to handle promptly all the interstate traffic of the country. It aims to give the owners of the railways an opportunity to earn enough to maintain their properties and equipment in such a state of efficiency that they can carry well this burden. To achieve this great purpose, it puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission which is to supervise their issue of securities, their car supply and distribution, their joint use of terminals, their construction of new lines, their abandonment of old lines, and by a proper division of joint rates, and by fixing adequate rates for interstate commerce, and in case of discrimination, for intrastate commerce, to secure a fair return upon the properties of the carriers engaged."

A specific and exhaustive examination of the provisions for extensions and abandonments was made in *Colorado* v. *U. S., et al.*, 271 U. S. 153. Mr. Justice Brandeis, writing for a unanimous court set forth at length the reasons why the statute was exclusive and why it was no violation of the rights of the state. The particular case before the court involved an abandonment but the reasoning of the opinion in discussing the rights of the state is equally applicable to an extension.

The opinion summarized the contentions of the State in

the *Colorado Case* and pointed out their fallacy as follows (p. 161 *et seq.*):

> "*First.* The main contention of the State is that the Commission lacks power to authorize the Company to abandon, as respects intrastate traffic, a part of its line lying wholly within the State. The argument is this. While a railroad cannot, in the absence of express statutory provision or contract, be compelled by a State to continue operating its lines at a loss when there is no reasonable prospect of future profit, and may therefore, without such consent, abandon all lines within the State, *Brooks-Scanlon Co.* v. *Railroad Commission,* 251 U. S. 396; *Bullock* v. *Florida,* 254 U. S. 513, 520; *Railroad Commission* v. *Eastern Texas R. R. Co.,* 264 U. S. 79, 85; it has no right to abandon a part of the lines, merely because operation will be attended by pecuniary loss, and still continue to enjoy the privilege of operating other parts within the State; *Chesapeake & Ohio Ry. Co.* v. *Public Service Commission,* 242 U. S. 603; *Fort Smith Light & Traction Co.* v. *Bourland,* 267 U. S. 330. The charter of the Colorado & Southern is a contract with the State. By accepting the charter, the Company assumed the obligation of providing intrastate service on every part of its line within the State, *Colorado & Southern Ry.* v. *Railroad Commission,* 54 Colo. 64, 92-3. The extent and character of this service is subject to regulation by the State. The inherent power of a State to regulate intrastate traffic by requiring the railroad to operate every part of its line, like its power to order a particular service, is, of course, subject to the limitation that the order must not be unreasonable. But the fact that operation of the branch will necessarily result in financial loss, would, in no event, be more than an

important circumstance bearing upon the reasonableness of the State's order requiring the service. In the case at bar no question of the reasonableness of the State's action can arise, because the State has not issued any order; it has merely protested against the Commission's releasing this Colorado corporation from the primary duty voluntarily assumed of maintaining some service on the branch. This, the Commission cannot do as respects intrastate commerce. Transportation Act, 1920, did not purport to take from the State its powers to control intrastate commerce. Nor did it confer upon the Commission power to release a corporation chartered by the State from its primary obligation to furnish service. If par. 18 of Section 1 should be construed as authorizing the Commission to do so without the consent of the State, the provision would be unconstitutional. Compare *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217. Such is the argument."

Having so summarized the contentions of the State the opinion showed their unsoundness as follows:

"The argument rests upon a misconception of the nature of the power exercised by the Commission in authorizing abandonment under paragraphs 18-20. The certificate issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens or discrimination. The Commission by its order removes an obstruction which would otherwise prevent the railroad from performing its federal duty. Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce. Expenditures in the local

interest may be so large as to compel the carrier to raise reasonable interstate rates, or to abstain from making an appropriate reduction of such rates, or to curtail interstate service, or to forego facilities needed in interstate commerce. Likewise, excessive local expenditures may so weaken the financial condition of the carrier as to raise the cost of securing capital required for providing transportation facilities used in the service, and thus compel an increase of rates. Such depletion of the common resources in the local interest may conceivably be affected by continued operation of an intrastate branch in intrastate commerce at a large loss.

The sole objective of paragraphs 18-20 is the regulation of interstate commerce. Control is exerted over intrastate commerce only because such control is a necessary incident of freeing interstate commerce from the unreasonable burdens, obstruction or unjust discrimination which are found to result from operating a branch at a large loss. Congress has power to authorize abandonment, because the State's power to regulate and promote intrastate commerce may not be exercised in such a way as to prejudice interstate commerce. The exertion of the federal power to prevent prejudice to interstate commerce so arising from the operation of a branch in intrastate commerce is similar to that exerted when a State establishs intrastate rates so low that intrastate traffic does not bear its fair share of the cost of the service. *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563; *Nashville, Chattanooga & St. Louis Ry.* v. *Tennessee*, 262 U. S. 318; or when the state authorities seek to compel the erection of a union station so expensive as unduly to deplete the financial resources of the carriers, *Railroad*

Commission v. *Southern Pacific Co.*, 264 U. S. 331; or when one railroad seeks to construct an intrastate branch line, which will deplete its own financial resources or those of another interstate carrier, *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Sante Fe Ry. Co.*, 270 U. S. 266. The jurisdiction exercised by the Commission in these cases is in the essence that which was invoked in *The Shreveport Case*, 234 U. S. 342, a power to prevent unjust preference to particular intrastate shippers or localities at the demonstrated expense of interstate commerce. But there is a broader basis for federal control.

This railroad, like most others, was chartered to engage in both intrastate and interstate commerce. The same instrumentality serves both. The two services are inextricably intertwined. The extent and manner in which one is performed, necessarily affects the performance of the other. Efficient performance of either is dependent upon the efficient performance of the transportation system as a whole. Congress did not, in the respect here under consideration, assume exclusive regulation of the common instrumentality, as it did in respect to safety coupling devices. Compare *Southern Ry. Co.* v. *United States*, 222 U. S. 20, *Atlantic Coast Line* v. *Georgia*, 234 U. S. 280, 293. It expressly excluded from federal control that part of the railroad which consists of 'spur, industrial, team, switching or side tracks located . . . wholly within one State.' See *Texas & Pacific Ry. Co.* v. *Gulf, Colorado & Santa Fe Ry. Co.*, *supra*. But as to the rest of every railroad line used in interstate commerce, Congress reserved the full authority to determine whether, and to what extent, public convenience and necessity permit of abandonment.

Recognition of the effect upon interstate commerce of the use of the same instrumentality in intrastate commerce is manifested also in other provisions of Transportation Act, 1920. It is a reason for the exclusive jurisdiction conferred upon the Commission by Section 20a over the issuance of securities. Compare *Venner* v. *Michigan Central R. R. Co., ante,* p. 127. It is the ground upon which the validity of the recapture clause, as applied to surplus profits derived from intrastate operations, was sustained in *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, 485. It is the justification for those provisions of the Interstate Commerce Act which require carriers engaged in both intrastate and interstate commerce to render accounts of all their business. *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194. And upon it rests likewise the power exerted by this Court setting aside the state regulations involved in *Union Pacific R. R. Co.* v. *Public Service Commission,* 248 U. S. 67, and *St. Louis & San Francisco Ry. Co.* v. *Public Service Commission,* 254 U. S. 535. See also *United States* v. *Ferger,* 250 U. S. 199; *Stafford* v. *Wallace,* 258 U. S. 495; *Chicago Board of Trade* v. *Olsen,* 262 U. S. 1.

The exercise of federal power in authorizing abandonment is not an invasion of a field reserved to the State. The obligation assumed by the corporation under its charter of providing intrastate service on every part of its line within the State is subordinate to the performance by it of its federal duty, also assumed, efficiently to render transportation services in interstate commerce. There is no contention here that the railroad by its charter agreed in terms to continue to operate this branch regardless of loss. Compare *Railroad Commission* v. *Eastern Texas R. R.*

Co., 264 U. S. 79. But even explicit charter provisions must yield to the paramount power of Congress to regulate interstate commerce. *New York* v. *United States,* 257 U. S. 591, 601. Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission."

In *Transit Commission, et al.* v. *U. S. et al.,* 284 U. S. 360, the State of New York and the Transit Commission, notwithstanding what the Court had said in the *Colorado Case,* strenuously fought against the doctrine of the exclusiveness of Section 1(18). The Court said, all concurring:

"It [the Interstate Commerce Commission] followed the course outlined in *Colorado* v. *United States, supra,* and the claim that its action was beyond its authority and without warrant of law cannot be sustained. That decision required a holding that appellant's assertion of unconstitutional invasion of the State's sovereignty is without merit. We need not elaborate what was there said on the subject (271 U. S. 165)."

In the *Los Angeles Terminal Cases*, 264 U. S. 331; 280 U. S. 52; and 283 U. S. 380, discussed at length hereinafter, the Court held as will be seen that while the state could in proper case compel the construction of a joint terminal the Interstate Commerce Commission had because of Section 1(18) exclusive jurisdiction over the *extensions* and abandonments necessary in order to permit the joint users to carry their lines into the joint terminal.

II.

The operation by one railroad company beyond its chartered route over the line of another railroad company by a joint facility trackage agreement is an extension within the requirements of Section 1(18).

1. The language of Section 1(18) clearly applies not only to construction of new trackage by a carrier in extension of its routes but to operation beyond its chartered routes by trackage agreement over the tracks of another carrier. The wording of Section 1(18) as the statute was enacted in 1920, is as follows (italics ours):

> "After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire *or operate any line of railroad, or extension thereof*, or *shall engage in transportation* under this Act over or by *means of such additional or extended line of railroad*, unless and until there shall first have been obtained from the Commission a certificate that the pres-

ent or future public convenience and necessity require or will require the *construction, or operation, or construction and operation,* of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment."

Plainly the intent was to prevent a carrier from operating beyond its chartered routes either over a branch or extension it might construct and own or over any line of railroad by whomsoever constructed or by whomsoever owned. The prohibition is against constructing or acquiring or operating. The certificate must be to the effect that the present or future public convenience and necessity require or will require (a) "construction" or (b) "operation" or (c) "construction and operation".

2. The purpose and purview of the broadened jurisdiction conferred by the Transportation Act amendments of 1920 to the Interstate Commerce Act demand such construction of the statute. If the restriction were construed as applicable only to extensions of operation by construction or acquisition of new line to be used only by the carrier and as not applicable to extensions by operation over tracks of another carrier by joint facility user, the purpose of the enlarged jurisdiction of the Interstate Commerce Commission would be defeated. Carriers by joint facility agreements could extend operation beyond their own chartered routes *ad libitum* entirely free from the supervision

and restraint of the Interstate Commerce Commission. The reasons why the extension of operation should be limited and scrutinized and certified as necessary apply quite as much to operation by joint facility use of tracks of another carrier as to operation by new tracks built and owned.

The Interstate Commerce Commission aptly said in a passage already quoted hereinabove (p. 7):

> "The reasonableness of a joint facility rental is in general a matter of public interest, as well as a matter which may affect the operations of the carriers in interstate commerce, and should be considered by us in reaching a finding of public convenience and necessity. Thus, the financial as well as the transportation features of the present application may be fully recognized and dealt with under the authority conferred by section 1(18). In cases of extensions of operations under trackage rights the cost of the applicant companies is not less important than in cases of extension by construction, acquisition, or lease."

3. The Interstate Commerce Commission in a multitude of cases, including the case here under review, has construed Section 1(18) as applicable to extension of operation by trackage agreement.

Missouri - Kansas-Texas Reorganization, 76 I. C. C. 84

Operation of Line by Superior & Southeastern Ry., 86 I. C. C. 403

Fort Worth & D. C. Ry.-C., R. I. & G. Ry., Trackage Rights, 99 I. C. C. 73, 76

Operation of Line by G. M. & N. R. R. Co., 111 I. C. C. 583

Operation by G. M. & N. R. R., 124 I. C. C. 641

Chicago & Alton R. R. Co. v. *T. P. & W. Ry. Co.*, 146 I. C. C. 171, and see the cases cited in the footnote at page 181.

Such an extension may and frequently does comprise or include a terminal and terminal approaches.

Fort Worth & D. C. Ry.-C., R. I. & G. Ry. Trackage Rights, supra

Operation of Line by Kansas City Southern Ry., 99 I. C. C. 777

See reference to terminals at Denver and Colorado Springs, in *Abandonment by C. R. I. & P. Ry. Co.*, 131 I. C. C. 421, at page 429

Operation under Trackage Rights by Baltimore & Ohio, 138 I. C. C. 171

Construction of Union Passenger Station and Equipment Terminal by Cincinnati Union Terminal Co., 138 I. C. C. 297

Control of L. & J. Bridge & R. R., 145 I. C. C. 131

Chicago & Alton R. R. Co. v. *T. P. & W. Ry. Co., supra.*

The Los Angeles Terminal Cases discussed in subdivision 4 immediately following.

The continued assumption of jurisdiction and the practical construction placed upon the statute by the administrative body empowered to enforce it while not conclusive is entitled to great weight, see *Boston & Maine Rd.* v. *Hooker*, 233 U. S. 97, 118; *Texas & Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426; *Logan* v. *Davis*

233 U. S. at 627; *N. Y. Central Securities Corp.* v. *U. S.*, 54 F(2) at 126.

4. This Court construed Section 1(18) as applicable to extensions by way of trackage rights in the Los Angeles Terminal Cases—*R. R. Comm.* v. *Southern Pacific Co.*, 264 U. S. 331; *I. C. C.* v. *Los Angeles*, 280 U. S. 52; *Atchison Ry.* v. *R. R. Comm.*, 283 U. S. 380.

In those cases it was held that the Interstate Commerce Commission had no jurisdiction to compel the construction of a joint terminal for several railroads in Los Angeles; that the California State Railroad Commission did have such jurisdiction; but with respect to the extensions, abandonments and the rearrangement of tracks necessary for the establishment of the terminal the Interstate Commerce Commission had jurisdiction; that is to say, the State could compel the terminal provided the Interstate Commerce Commission certified that convenience and necessity permitted the extensions and changes in the approaching tracks.

It is plain from the opinions in these cases that throughout the controversy this Court as well as the Interstate Commerce Commission treated operation by joint facility trackage agreement as an extension under Section 1(18). The Interstate Commerce Commission first made a Report (100 I. C. C. 421), July 6, 1925. It made a further examination and Report (142 I. C. C. 489), May 8th, 1928. In the latter Report the Commission said at page 497:

> "Reexamination of the whole subject again leads us to the conclusion that under existing law we are not empowered to require the construction of a union pas-

senger station of the character sought by the complaint; but that we are authorized to find (1) whether the present or future public convenience and necessity permits of the proposed abandonment of line, (2) whether the proposed extensions of line are reasonably required in the interest of public convenience and necessity, and whether the expenses involved therein will impair the ability of defendants to perform their duties to the public, and (3) whether such joint use of existing terminal facilities by other than the owning carriers, as would be necessary if a new passenger station were established in the Plaza area, is in the public interest and practicable, without substantially impairing the ability of the owning carrier to handle its own business. These are the conclusions which we reached upon the original presentation."

The findings made upon the earlier examination (100 I. C. C. 459) were adopted finally in the later decision and are reprinted as a footnote at pages 491-492 of 142 I. C. C. Finding 6 is as follows:

"'6. That the use by any defendant steam carriers of so much of the terminal main-line track or tracks of any of the other defendant steam carriers in the city of Los Angeles, Calif., as may be incidental, and necessary or convenient, to the proper operation of any such union passenger station and terminal as defendants or any of them, in accordance with a lawful order of the Railroad Commission of California, may construct and establish in that portion of said city described in paragraph 3 above, is in the public interest and is practicable, without substantially impairing the ability of the carrier or carriers owning or entitled to the enjoyment of such track or tracks to handle its or their own business.'"

In *Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, Mr. Chief Justice Hughes at the opening of his opinion (pp. 386-387) summarized the proceedings leading up to the decision in 100 I. C. C. 421 and commented on the decision as follows:

> "These are appeals from judgments of the Supreme Court of California, which affirmed an order of the Railroad Commission of that State requiring the appellants to construct a union passenger station in the City of Los Angeles, together with incidental connections, extensions, improvements and terminal facilities, in substantial compliance with the plan outlined by the Commission. 209 Cal. 460; 288 Pac. 775.
>
> Proceedings were begun before the State Railroad Commission in the year 1916, and in December, 1921, after two hearings, the Railway Companies were required to remove certain grade crossings and to build a union terminal within a defined area known as the Plaza site in Los Angeles. 19 Op. R. R. Com. Cal. 740; 20 *id.* 937. The Supreme Court of the State held that the order was beyond the power of the Commission, because the subject matter had been committed to the Interstate Commerce Commission by the Transportation Act of 1920. 190 Cal. 214; 211 Pac. 460. The judgment was affirmed by this Court. 264 U. S. 331. The Court held that the relocation of tracks, which was incidental to the proposed union station, required a certificate of approval of the Interstate Commerce Commission under paragraphs 18 to 21 of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act of 1920 (41 Stat. 476-478), as a condition precedent to the validity of any action by the carriers or of any order by the State Railroad

Commission. (Footnote—See *Interstate Commerce Commission* v. *U. S. ex rel Los Angeles,* 280 U. S. 52, 61.)

Pending the consideration of that case, a proceeding was instituted before the Interstate Commerce Commission by the City of Los Angeles to obtain an order requiring the three Railway Companies to build the union station at the designated place. That Commission decided, July 6, 1925 (100 I. C. C. 421), that it was without authority to require the construction of the station. But, in order to facilitate the disposition of the case, the Commission made certain hypothetical certificates substantially as follows: (Footnote —*I. C. C.* v. *U. S. supra,* pp. 62, 63.)

'(1) That the public convenience and necessity require the extensions of lines that may be necessary to reach and serve any union passenger station within the plaza which may be constructed in accordance with a lawful order of the State Commission and that may be necessary to provide for the incidental rearrangement of passenger and freight routes, and that the expense involved will not impair the carriers' ability to perform their duties to the public. (2) That public convenience and necessity permit the abandonment of train service on Alameda Street and such other abandonments of lines as would be necessary in connection with the establishment of any such station, so lawfully ordered by the State Commission. The report further found that such joint use of track or other terminal facilities as may be incidental and necessary to the proper operation of any such union station is in the public interest and is practicable, without substantially impairing the owning carriers' ability to handle their own business.' "

It will be noted that the last sentence in the foregoing excerpt recognized the applicability of Section 1(18) to joint facility extensions and that the sentence quoted was from the opinion by Mr. Chief Justice Taft in 280 U. S. at pages 61, 62, 63.

After reciting intervening steps Mr. Chief Justice Hughes continues in his opinion at page 389:

> "Petitions for final order were then presented by the City of Los Angeles and the State Commission to the Interstate Commerce Commission. After further hearing the latter Commission made its report, on May 8, 1928, adhering to the conclusions of its former report that 'public convenience and necessity' required the extension by the Railway Companies of their respective main lines in the City of Los Angeles 'so as to reach and serve a union passenger station and terminal which they may construct in the Plaza district', pursuant to order of the State Commission to that effect, with 'the abandonment of other portions of main lines to provide for incidental rearrangement of routes, and the abandonment of train service on Alameda Street' and that 'such joint use is in the public interest and practicable, without impairing the ability of the carrier or carriers owning or entitled to the enjoyment of such track or tracks to handle its or their own business.' The Interstate Commerce Commission issued its certificate accordingly, but the petition for the issue of an order requiring the Railway Companies to construct a union station was denied. 142 I. C. C. 489."

It will be noted that the opinion again refers to joint use of tracks as coming within 1(18).

III.

The provisions of Section 1(18) apply to the continuance of an operation begun prior to 1920.

The fact that the Transit Commission had jurisdiction prior to 1920 over the joint facility trackage use and had exercised such jurisdiction did not suspend the operation of Section 1(18) and continue the jurisdiction of the Transit Commission.

The approval of the successive agreements by the Transit Commission and its predecessor, the Public Service Commission, was required because under the New York State statute a carrier could use the tracks of another carrier only with the approval of the State Commission (Sec. 148, Railroad Law) and as a condition of granting such approval the State Commission could specify the rental terms and conditions.

The successive agreements were for limited periods of time. As pointed out in both Reports the last of the trackage agreements expired with the year 1926 (162 I. C. C. at p. 220, 180 I. C. C. at p. 439).

An existing trackage contract (whatever the rights between the parties might be, compare *Central New England R. Co.* v. *B. & A. R. Co.*, 279 U. S. 415, at 419-420, and *Western Pacific R. Co.* v. *Nevada-California-Oregon R.*, 40 F (2) at 733), could not stand in the way of the exercise of the Interstate Commerce Commission's exclusive jurisdiction over extensions and abandonments. All existing contracts must yield to the paramount power of Congress over interstate commerce. Suffice to say however that in

this case now before the Court there was no existing trackage agreement when the railroad companies went to the Interstate Commerce Commission.

It is obvious that after the Transportation Act of 1920 had added Section 1(18) to the Interstate Commerce Act the State Commission could not compel abandonment of operation or specify the terms upon which it would permit operation to continue. The Transit Commission's power to authorize one interstate carrier to use the tracks of another jointly with the owning company was completely gone. And with it went the power to prescribe trackage rental terms.

The power to prescribe rental terms was based upon the power to prevent operation on other than approved terms. After the enactment of 1(18) the State Commission had no power to compel abandonment of operation. The jurisdiction over abandonment was exclusively in the Interstate Commerce Commission. In other words the question of continuing or discontinuing operation was entirely in the hands of the Interstate Commerce Commission and with it went the power to pass on the trackage rental terms.

Conclusion.

It is respectfully submitted that the decree below should be affirmed.

ALFRED A. GARDNER,
D. P. WILLIAMS,
JOSEPH F. KEANY,
of Counsel.

January 31, 1933.